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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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# No. 943

J. D. COLLINS,

*Petitioner,*

*vs.*

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; ET AL.

---

# No. 944

S. D. LOUNT,

*Petitioner,*

*vs.*

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; ET AL.

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**PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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JOHN J. McCULLOUGH,
*Counsel for Petitioners.*

E. E. SELDEN,
*Of Counsel.*

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# No. 944

S. D. LOUNT,

*Petitioner,*

*vs.*

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; COIT I. HUGHES AND H. B. HUGHES, WIFE OF COIT I. HUGHES,

*Respondents.*

---

## PETITION FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, Greeting:*

Your petitioners respectfully pray for writs of certiorari to review the decrees of the Circuit Court of Appeals entered on November 29th, 1940 (Record Collins 43),

(Record Lount 40), affirming the dismissals rendered and entered in the District Court of the United States, for the District of Arizona, Phoenix Division, October 28th, 1939, and March 18, 1940, respectively. (R. C. 19) (R. L. 18).

**Short Statement of Matter Involved.**

These matters were presented to the United States District Court for the District of Arizona, Phoenix Division, by complaints duly filed by your petitioners to quiet title to certain real property, and the substance of said complaints was to the effect that your petitioners are resulting *Cestuis ques trustent* of certain present and future rights in the premises described, and the rents, issues and profits thereof, under the will of Julia A. Lount, who died April 26, 1907.

Your petitioner, J. D. Collins, is the assignee for value, and successor in interest to Frances Lount, a grandchild of Julia A. Lount, deceased. Your petitioner, S. D. Lount, is the son of William B. Lount and grandson of said Julia A. Lount, deceased. William B. Lount and Hattie L. Mosher were the only children of Julia A. Lount.

The complaints set forth the text of the will of said Julia A. Lount, deceased, in *haec verba* (R. C. 9), (R. L. 11). The pertinent portions of the Will are set forth in the Opinion of the Circuit Court of Appeals in the Collins case.

115 F. (2d) 900 (R. C. 38).

The Opinion in the Collins' case is adopted as the Opinion in the Lount case (R. L. 33).

The pertinent portions of the will are as follows:

> "I give, devise and bequeath unto my son William B. Lount and to my said daughter Hattie L. Mosher, jointly, all of the residue and remainder of my property, real, personal and mixed, wherever situated, in

trust however, to be by them managed, controlled, leased, sold and distributed, in the manner following:

"(1) Said trustees shall manage, control, lease, hypothecate and sell any and all of such residue estate as they in their judgment shall deem best for the beneficiaries hereunder and without other or further authority from the probate or other court; and shall, without other authority than their own and the authority herein contained, execute deed, deeds or other instruments of conveyance of any such residue of which I may die seized, and it is my intention that such conveyance shall be sufficient in law. * * *

"(5) After the foregoing provisions have been carried out I direct that the remainder of the residue of my estate be distributed as follows:

"(a) Distribute all rents, issues and profits, and the proceeds of any sale or sales of real estate which came to me through the estate of my late husband, Samuel D. Lount, deceased, (I owning three quarters and my son owning one quarter thereof) two quarters of my said three quarters to my daughter, Hattie L. Mosher, and the other quarter to my said son.

"(b) Distribute all rents, issues and profits, and the proceeds of any sale or sales of real estate, or other property, belonging to the co-partnership of S. D. Lount and Son, my interest therein being the one-half, five of my eight sixteenths to my said daughter and the other three sixteenths to my said son.

"(c) Distribute all rents, issues and profits, and the proceeds of any sale of real estate or other property belonging to me and not otherwise hereinbefore provided for, share and share alike between my said son and daughter."

There was also provision for a succession of trustees in case of death or failure to act, but no beneficiaries are named except the trustees, and no residuary beneficiaries are named.

All of the rights of your petitioners are alleged to come primarily from the trust created by the terms of the will of said Julia A. Lount, deceased.

Petitioners' sole contention is that they are the beneficiaries of a present resulting trust in the rents, issues and profits from the land described, since the death of William B. Lount in 1924, and have an interest as resulting *Cestuis ques trustent* in the residue.

They ask that the title be quieted in the trustees; that said trustees be declared to have the title in fee simple; that the Court interpret the rights of the plaintiffs in the rents, issues and profits, and the proceeds of sales since the death of W. B. Lount August 31, 1924, and in the case of S. D. Lount, for an accounting (R. L. 9).

In defense to said complaints the respondents filed in said District Court motions to dismiss, denying that the Will of Julia A. Lount, deceased, created a trust, as alleged in your petitioners' complaint (R. C. 14), (R. L. 16), R. C. 14, 16 and 17).

Respondents' motions ta dismiss were granted by the District Court, and petitioner appealed to the Circuit Court of Appeals, Ninth Circuit, where the judgment of the District Court dismissing the complaint was affirmed (R. C. 43), (R. L. 40).

The only matter discussed in the opinion of the Circuit Court of Appeals in the *Collins* case,

115 F. (2d), at page 900,

or in the *Lount* case,

115 F. (2d), at page 903,

is the construction of the will of Julia A. Lount, deceased, and the only matter with which this petition for certiorari is concerned is with the interpretation of said will.

## Statement Disclosing Jurisdiction of this Court.

These causes were commenced by complaints filed by your petitioners in the District Court of the United States, District of Arizona, Phoenix Division (R. C. 2) (R. L. 1). Said complaints allege a complete diversity of citizenship and the amount involved, in both cases, is in excess of three thousand dollars ($3,000.00).

From an adverse judgment of the said District Court, your petitioners duly and regularly appealed to the Circuit Court of Appeals, Ninth Circuit, where said adverse judgments were affirmed on November 29th, 1940 (R. C. 43) (R. L. 40). To these adverse rulings your petitioners duly filed their motions for rehearing (R. C. 44) (R. L. 41), and three months have not elapsed since the denial thereof. Jurisdiction is given this Court by 28 U. S. C. A., Sec. 347 (Jud. Code, Sec. 240, as amended).

## Questions Presented.

1. The first question presented is whether a will devising all the residue of an estate to the only two children of the testatrix, naming said children as the trustees of the estate to manage and control it as they in their judgment think best for their own *benefit,* and to divide the rents, issues and profits, in varying proportions between themselves, depending upon the property involved, and providing for succession of trustees, but not naming any residuary beneficiaries whatever, creates a valid trust?

2. The second question is, whether, assuming that the will of Julia A. Lount, deceased, created a trust, in the absence of the personal right in the first beneficiaries to use and dispose of the property, does the fact that no ultimate beneficiaries are named except the two original trustees themselves, and the further fact that said trustees and bene-

ficiaries have the right to the use and enjoyment, at their discretion and for their benefit, not only of the income of the property, but of the corpus of the estate, itself, destroy the trust and vest the title in the trustee beneficiaries in fee simple?

3. The third question is, if a valid trust was created, with a possibility that there might be a residue after the death of one, or both, of the named beneficiaries, whether such possibility of residue would vest immediately as a *remainder* at the death of Julia A. Lount, deceased, and therefore vest in the immediate heirs of said deceased, namely, William B. Lount and Hattie L. Mosher, the only children of the testatrix, or whether such residue, if any, would spring up, as it were, and revert back only upon the death of one, or both, of said trustee beneficiaries, to the estate of Julia A. Lount, deceased, so that your petitioners would have a present, and future, interest therein?

**Reasons for Allowance of Writ.**

*First Reason.*

1. The Circuit Court of Appeals, Ninth Circuit, has decided an important question of local law in a way probably in conflict with applicable local decisions. The Court of Appeals said:

> "The trustees, if there is a trust, are the testatrix' children, William B. Lount and Hattie L. Mosher, the same two who are named as the sole beneficiaries of the 'trust'. They are given full powers of management and control, with power to dispose of any and all of the assets of the estate. The rents, issues and profits of the estate, and the proceeds of any sale or sales of properties are to be distributed to William B. Lount and Hattie L. Mosher in certain proportions, depending upon the source of the property sold. Such a bequest passes absolute title to the land itself." Citing cases. (R. C. 40) (R. L. 37).

The language of the will shows that, while the title to the property is devised to, and vested in, the *two trustees* in a fee, conditioned only by the trust, and no "life estate", in terms, is created; nevertheless, the beneficial interest of William B. Lount and Hattie L. Mosher is of necessity confined to a "life estate", and the trust must necessarily terminate upon the death of the last survivor of the named beneficiaries, to-wit, Hattie L. Mosher.

2. The Supreme Court of the State of Arizona in two cases has stated that a life estate will not be enlarged into a fee simple estate merely because the life tenant is given full power of sale and management for his own use and benefit.

See:

*In re Sear's Estate. Olliver, et al.,* v. *Sears,* 54 Arizona 52, 91 Pac. (2d) 874.

And:

*Smith* v. *Teel,* 35 Arizona 274, 276 Pac. 850.

The questions here involved are of great general interest and importance, for not only is the land involved in this case of considerable value, but this case can well serve as a precedent for transforming any "Life Estate with power of sale into a fee simple estate, a matter which will be before the courts very frequently and has already been the subject of controversy in hundreds of cases, most of which conflict with the views expressed by the Circuit Court of Appeals in this cause.

See:

69 Corpus Juris, pages 556, 557, 558 and 559, Sec. 1632.

The opinion of the Circuit Court of Appeals, Ninth Circuit, is also probably in conflict with future decisions of the Arizona Supreme Court in deciding that no trust existed, whereas the will created a spendthrift, or discretionary,

trust. Such trusts were valid in Arizona in 1904 by reason of the common law, as well as the Revised Statutes of Arizona 1901.

See:

Section 4232, R. S. of A. 1901.

Said section is set forth in an "Appendix" to this petition and brief at page 15.

Matters concerning real property located within a particular State and the construction of wills devising real property have always been considered as matters of local concern to the courts where the land is situated and the will is probated.

Mr. Justice Holmes has said in construing a will devising real property:

> "We should lean toward an agreement with the state courts, especially in a matter like this."
>
> *Messenger* v. *Anderson,* 225 U. S. 436, at page 445, 32 S. Ct. 739, 56 L. Ed. 1152.

Especially is this true since the recent decision of this Honorable Court in the well known case of:

*Tompkins* v. *Erie,* 304 U. S. 64, 58 S. Ct. 817,

reversing

*Swift* v. *Tyson,* 16 Pet. 1, 18, 10 L. Ed. 865.

*Second Reason.*

That part of the opinion in the Circuit Court of Appeals, in these cases, stating that the will does not create a trust is contrary to the Circuit Court of Appeals, Fifth Circuit, in the case of:

*Vellacott* v. *Murphy,* 16 F. (2d) 700.

The decision of the Circuit Court of Appeals, Ninth Circuit, in the instant case is contrary to:

*Vellacott* v. *Murphy* (*supra*),

because in the latter case the court held that a trustee can be a beneficiary so long as he is not both the *SOLE* trustee and the *SOLE* beneficiary.

The instant case will certainly become a precedent for the theory that plurality of both trustees and beneficiaries does not sustain the validity of a trust.

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

JOHN J. MCCULLOUGH,
*Counsel for Petitioners,*
*Phoenix, Arizona,*
*Sixth Floor, Luhrs Tower.*

E. E. SELDEN,
*Associate Counsel.*

## BRIEF.

### Opinions of the Circuit Court of Appeals.

The opinions rendered in these causes by the Circuit Court of Appeals, Ninth Circuit, are found in:

115 F. (2d), at page 900 (Collins),

and

115 F. (2d), at page 903 (Lount).

### Jurisdiction.

The facts upon which your petitioners rely for jurisdiction of this Court are fully set forth in the petition for writ of certiorari, page 5 hereof, and for the sake of brevity incorporated in this brief by reference, only.

### Facts.

The facts are also stated in the petition, page 2.

### Specification of Errors to be Urged.

1. The Court erred in answering question 1, as set forth on page 5, of this petition and brief, to the effect that no trust was created by the will of Julia A. Lount, deceased.

2. The Court erred in holding in answer to question 2, as set forth on page 5 of this petition and brief that the power to sell the property vested in said trustee beneficiaries, vested the fee simple title in said beneficiaries.

3. The Court erred in holding in answer to question 3, on page 6 of this petition and brief that the possible residue of the estate of Julia A. Lount, deceased, vested at her death in her immediate heirs instead of springing up at the death of William B. Lount and Hattie L. Mosher.

## ARGUMENT.

### Point I.

There was a valid trust created because it is generally recognized that merger is not favored in the law, and will occur only where the sole trustee is also the sole beneficiary and the estate of the trustee and beneficiary are alike both as to quantity and quality.

Bogert Trusts, Vol. 1, page 383, Sec. 129.
Pomeroy's Equity Jurisprudence, Vol. 3, Fourth Edition, Sec. 987, page 2147, note in first column on page 2147 under heading "Beneficiary as Trustee."
65 Corpus Juris, Sec. 337.
*Vellacott* v. *Murphy,* 16 Fed. 2d 700.
Restatement of Trusts, Sec. 99 (4).

There being no local law on this subject in Arizona, Restatement of Trusts governs.

*Cole* v. *Edison Company,* 53 Arizona 141, at 144, line 15, 86 Pac. (2d) 946, at 947, Col. (2).

The trust created by the will of Julia A. Lount, deceased, was a spendthrift, or at least, a discretionary, trust, because the use of all or any portion of the estate was left entirely to the unfettered "judgment" of the trustees, as they might deem best. See pertinent portions of the will, page 2 thereof.

Such discretionary power, even without specific designation, created a spendthrift trust.

*Morrow* v. *Apple,* 26 F. (2d) 543.
*Everett* v. *Haskins,* 102 Kan. 546, 171 Pac. 632.
*Wemps* v. *White,* 159 Mass. 484, 34 N. E. 718.
Bogert Trusts, Vol. 1, page 738, Sec. 225, Note 9.

The doctrine of merger does not apply to a spendthrift trust.

*Bowlin* v. *Citizens Bank and Trust Co.,* 131 Ark. 97, 198 S. W. 288.
Corpus Juris 568, 569, Sec. 325, Note 70, on page 569.

**Point II.**

The powers of management and sale conferred upon the trustee beneficiaries did not convert the devise into a devise of a fee simple. The will devises all the rest and residue of the estate to William B. Lount and Hattie L. Mosher, jointly, "in trust", however. Page 2, hereof.

Such a devise passed the fee to the trustees, as such, but the fee is not a fee simple but a limited fee conditioned by the trust and terminating upon the termination of the trust.

The trust must *ipso facto* terminate upon the death of the last of the named beneficiaries. There can be change of trustees under the will, but no change of beneficiaries.

The beneficial estate of William B. Lount and Hattie L. Mosher is by its very nature necessarily a "life estate".

Such life estate cannot be enlarged into a fee merely because the life tenants, acting in their capacity of joint trustees and watch-dogs, each for the interest of the other;

Hance's Estate, 68 Pa. Super. 432,

have the power to sell the property for their own use and benefit.

In re Sear's Estate, *Olliver* v. *Sears,* 54 Ariz. 52, 91 Pac. 2d 874.
*Smith* v. *Teel,* 35 Ariz. 274, 276 Pac. 850.

The cases cited by the Circuit Court of Appeals in support of the theory that the power of sale granted by the testatrix vested a fee simple (R. C. 40, 41) (R. L. 38),

*Kimberlin* v. *Hicks,* 94 Pac. 2d 335, 337;
*Lachmund* v. *Moore,* 192 Iowa 980, 181 N. W. 4;
*Schnack* v. *City of Larned,* 106 Kan. 177, 186 Pac. 1012, 1014;
In re Frank's Estate, 190 Cal. 28, 210 Pac. 417, 418,

are all cases of the perpetual grant of the rents, issues and profits, and none of these cases are concerning a mere life tenancy such as the beneficial interest of William B. Lount and Hattie L. Mosher in the instant case.

In one of the foregoing cases, to-wit:

> *Schnack* v. *City of Larned*, 106 Kan. 177, 186 Pac. 1012, at page 1014,

Lord Coke is quoted as follows:

> "But if a man seised of lands in fee by his deed (or will) granteth to another the profit of those lands, and to have and to hold him to and his heires * * * the whole land itself doth passe; for what is the land but the profits thereof; for thereby vesture, herbage, trees, mines and all whatsoever parcel of the that land doth passe."
>
> 1 Coke upon Littleton, L. 1, C. 1, sec. 1 (4b).

These quaint and picturesque phrases in Old English have formed the foundation for much sound law and your petitioner respectfully suggests to this Court that the Opinion of the Circuit Court of Appeals in the instant case with its purported, though erroneous analogy to the case of "*Schnack* v. *The City of Larned*" (*supra*), may well serve as the starting point for a perversion of the legal principles laid down by Lord Coke and become the foundation for many erroneous decisions.

**Point III.**

It is contended in the opinion of the Circuit Court of Appeals that if there was any part of the estate of Julia A. Lount undisposed of by the terms of her Will, said estate was in the nature of a remainder, and therefore vested at the death of the testatrix in William B. Lount and Hattie L. Mosher.

Such is not the case because the vesting of the residue of the estate is necessarily postponed until the death of one or both of the trustees, leaving part of the estate undisposed of.

*Blount* v. *Walker*, 9 S. W. 804 at 807.

**Summary and Conclusion.**

Because the Will of Julia A. Lount did create a valid Spendthrift or Discretionary Trust, and did vest a valid "Life Estate" in William B. Lount and Hattie L. Mosher, it is apparent that the decision of the Circuit Court of Appeals, Ninth Circuit, in holding that a fee simple is vested in said parties by the unlimited power of sale is contrary to the well settled local law of Arizona, and contrary to a decision of another Circuit Court of Appeals, upon very important and much litigated points of law.

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari be granted.

JOHN J. MCCULLOUGH,
*Counsel for Petitioners. Sixth Floor, Luhrs Tower, Phoenix, Arizona.*

E. E. SELDEN,
*Associate Counsel.*

## APPENDIX.

"Should any father or mother, in consequence of the idleness, dissipation or extravange of his or her child or children, apprehend that his, her or their estate will be squandered if left to their management or control, it shall be lawful for such father or mother, by last will and testament, to leave such estate in the hands of trustees, to be appointed by said will, which trustees shall have the entire management and control of said estate, the profit of which, after deducting expenses of said management, shall be paid over to the child or children entitled to the same for his, her or their maintenance and support; and it shall be lawful, at any time, for the court of probate in the county where such estate may be situated, or where such trustee or trustees may reside, to take cognizance of the same and to remove such trustee or trustees from the management of the same: Provided, It shall be made to appear that such estate is being wasted or improperly managed; and to appoint other trustees for the management thereof, taking bond and security from such trustees in a sum at least equal to the value of such estate for the faithful performance of the trust; and, if the child or children entitled to such estate, or any part thereof shall, at any time, make it appear to the satisfaction of said court that the causes for leaving said estate in trust no longer exist, and that there is no danger of its being squandered by idleness, dissipation or extravagance, it shall be the duty of said court to dissolve said trust, and place the said estate in the hands of the person or persons who would have been entitled to the same had such trust not been created."

Revised Statutes of Arizona, 1901, Paragraph 4232, Section 21.

Supreme Court of the United States

October Term, 1940

No. 243

J. D. COLLINS,

Petitioner,

vs.

HATTIE E. MOSHER, [illegible]
Widow; HATTIE E. [illegible]
Trustee, [illegible]
LEON A. Widower; [illegible]
Widower; JOHN [illegible]
Tenant, KATIE F. YOUNG, [illegible]

BRIEF OF RESPONDENTS [illegible]
KATIE F. YOUNG [illegible]
CTION FOR WRIT [illegible]

[illegible]

Attorneys for Respondents,
E. SEEBERGER and
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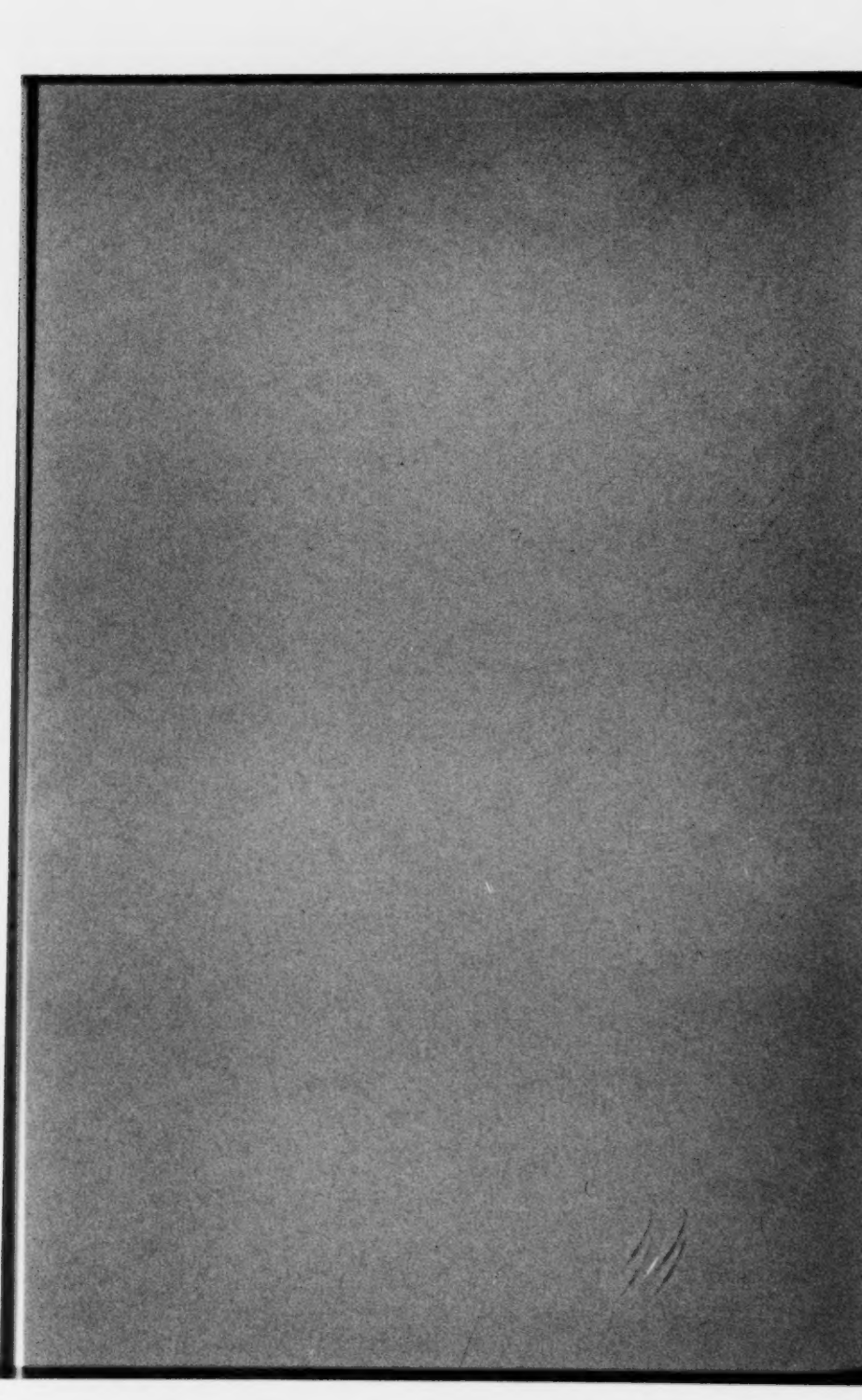

# Supreme Court of the United States

## October Term, 1940

No. .....

J. D. COLLINS,

Petitioner,

vs.

HATTIE L. MOSHER, Individually, a Widow; HATTIE L. MOSHER, as Trustee, a Widow; NIELSINE HERLICK, a Widow; L. SKREHOT, a Widower; JOHN J. HANLON, as Tenant; KATIE F. YOUNG, a Widow,

Respondents.

## BRIEF OF RESPONDENTS, L. SKREHOT AND KATIE F. YOUNG, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondents,
L. SKREHOT and
KATIE F. YOUNG.

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## OPINIONS DELIVERED

The trial court wrote no opinion.

The opinion of the Circuit Court of Appeals is officially reported in 115 Fed. 2d) 900, and is printed in the Transcript of Record, pages 36-42.

## JURISDICTION OF SUPREME COURT

It is admitted that this court has jurisdiction of this case on certiorari. It is submitted, however, that no ground for review is presented under Subdivision 5 of Rule 38 of this court.

## STATEMENT OF CASE

This is a suit to quiet title to a tract of real estate in Phoenix, Arizona, by the plaintiff a resident of Oregon against the defendants, residents of Arizona.

Plaintiff claims, as the grantee of Frances Lount daughter of William B. Lount, deceased. The claim of Frances Lount is made through the will of Julia A. Lount, mother of William B. Lount and defendant, Hattie L. Mosher. Said will, pages 9-14, Transcript of Record, purported to devise to said William B. Lount and Hattie L. Mosher the property in question, in trust, to satisfy certain specific bequests, one of which was to provide a wedding trousseau to the said Frances Lount grantor of the plaintiff, and disposed of the residue of the estate by distribution of all the rents, issues and profits and the proceeds of any sale or sales of real estate to said Trustees.

Plaintiff claims that this will vested in said Trustees a life estate only, suspending the remainder in fee of each Trustee's portion until his death, when, it is alleged, the remainder in fee for that portion, vested in the heirs of the testatrix, Julia A. Lount.

The Circuit Court of Appeals affirming the decision of the trial court held:

(1) That the will by devising absolutely to the Trustees, the rents, issues and profits, the absolute power of sale and absolute right to the proceeds of sale, vested a fee simple title in the Trustees after the specific legacies had been paid, and

(2) That if petitioner's contention that the will created a trust were accepted, the result would be that the remainder in fee vested immediately upon the testatrix's death in her heirs—said heirs being the same persons as the Trustees and in either event, these respondents, claimants under conveyance from said William B. Lount and Hattie L. Mosher, would have good title to the property.

## ARGUMENT

Petitioner sets up two reasons for allowance of Writ of Certiorari by this court. (Pages 6-9 of Petition for Writ and Brief) These are:

1. That the Circuit Court of Appeals decided an important question of local law in conflict with applicable local decisions, and

(2) That a part of the opinion of the Circuit Court of Appeals of the Ninth Circuit in this case is contrary to a decision of the Circuit Court of Appeals of the Fifth Circuit.

The first reason is not sustained.

The two cases: In Re Sears Estate, 54 Ariz. 52; 91 Pac. (2d) 874, and

Smith v. Teel, 35 Ariz. 274; 276 Pac. 850, cited on page 7 of Petitioner's Petition and Brief, are both cases construing wills bequeathing property to testator's widow for life, remainder to testator's children in fee, with broad, but not absolute powers of sale granted to the widow.

In each of those cases the question of whether the will conveyed a fee simple estate to the widow was not presented or discussed by the court. The controversy in each of those cases was the extent of the widow's power, and in each case the court held the power had not been exceeded by the acts of the widow. There was no occasion to consider whether the widow's life estate was extended to a fee simple by the power of sale.

Petitioner also makes reference to Section 4232 Revised Statutes of Arizona, 1901, a copy of which is set forth on page 15 of the Petition and Brief.

No interpretation has ever been placed upon that Section by the courts of Arizona with reference to the questions here involved.

Petitioner's contention to the effect that the Circuit Court of Appeals rendered a decision at variance with the local law of Arizona, is not sustained. Petitioner had previously made the same contention with respect to the same trust in a prior case in which the Circuit Court of Appeals of the Ninth Circuit determined that the trust terminated when the specific bequests were paid.

Collins v. Mosher, 91 Fed. (2d) 582-584.

When Petitioner filed this case he, therefore, was familiar with the views of the Circuit Court of Appeals on this question. Notwithstanding this knowledge he again elected the jurisdiction of the Federal Court instead of going to the state court; presumably because he was fearful that the state court would not decide in his favor.

It is certainly going a long way for the petitioner to ask this court to hold that a prior decision of the Circuit Court of Appeals is at variance with the decisions of the Supreme Court of Arizona when he had the opportunity to go directly to the last named court to establish the contention which he is now making before this court.

Reference to the opinion in:

Collins v. Mosher, 91 Fed. (2d) 582, 584, and the opinion in this case, 115 Fed. (2d) 900, discloses the fact that two District Court Judges and four Circuit Court of Appeal Judges have unanimously rejected the construction which plaintiff places upon the Arizona law. The two District Judges, of course, were

Arizona lawyers, and the four Circuit Court of Appeals Judges are presumably not wholly unfamiliar with Arizona law.

It is presuming a great deal for Petitioner to come to this court saying that the Arizona law has been misinterpreted in this case.

The second reason advanced by Petitioner is wholly without merit since the question to be decided is wholly one of the local law of Arizona.

Tompkins v. Erie, 304 U. S. 64; 58 S. Ct. 817; 82 Law Ed. 1188.

A decision of the Circuit Court of Appeals of the Ninth Circuit construing Arizona law cannot be in conflict with a decision of the Circuit Court of Appeals of the Fifth Circuit construing the law of Texas.

Vellacott v. Murphy, 16 Fed. (2d) 700.

**ON THE MERITS**

The decision of the Circuit Court of Appeals was plainly right upon both grounds stated in the opinion. Where a devise, though stated to be made in trust, grants to the devises the unrestricted right to rents, issues and profits and to manage, control and sell and use the proceeds without restriction, such devise clearly passes the fee simple estate, and also, where a devise is made for life without disposing of the remainder in fee, said remainder necessarily vests in the testator's heirs immediately upon his decease. The contention

that it remains suspended until the life tenants death, violates a fundamental rule of the common law.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

J. L. GUST,
FRED W. ROSENFELD

Attorneys for Respondents,

L. SKREHOT, and
KATIE F. YOUNG.

313 U.S. 581

MAY 23 1941

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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## No. 943

J. D. COLLINS,

*Petitioner,*

*vs.*

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW, ET AL.

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## No. 944

S. D. LOUNT,

*Petitioner,*

*vs.*

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW, ET AL.

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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# REPLY BRIEF OF PETITIONERS.

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JOHN J. McCULLOUGH,
*Counsel for Petitioners.*

E. E. SELDEN,
*Of Counsel.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

---

# No. 943

J. D. COLLINS,

*Petitioner,*

*vs.*

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; NIELSINE HERLICK, A WIDOW; L. SKREHOT, A WIDOWER; JOHN J. HANLON, AS TENANT; KATIE F. YOUNG, A WIDOW,

*Respondents.*

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# No. 944

S. D. LOUNT,

*Petitioner,*

*vs.*

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; COIT I. HUGHES AND H. B. HUGHES, WIFE OF COIT I. HUGHES,

*Respondents.*

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## REPLY BRIEF OF PETITIONERS J. D. COLLINS AND S. D. LOUNT.

### Statement of Case.

The statement of the case by respondents L. Skrehot and Katie F. Young is incomplete in the following respects, to-wit:

On page three of said respondents' brief, the last three lines, we find the following:

> "* * * and disposed of the residue of the estate by distribution of all the rents, issues and profits and

> the proceeds of any sale or sales of real estate to said Trustees."

This is inaccurate because the rents, issues and profits were not given to the Trustees in any such unfettered manner.

They were directed in substance to manage, control, lease, sell and distribute any and all of the residue of the estate as:

> "they in their judgment shall deem best for the beneficiaries hereunder * * *" (R. C. 10) (R. L. 12).

The whole of the residue of the estate was clearly put in the hands of the son and daughter "JOINTLY" (R. C. 10) (R. L. 11).

> "IN TRUST HOWEVER" (R. C. 10) (R. L. 11).

The only tenable construction of the Will makes the whole residue subject to the trust and directs that said residue is to be controlled by the trustees as they deem best for their own interest. The legal title was thus vested in fee in the trustees JOINTLY subject only to the terms of the trust.

It is therefore incorrect to say that petitioner claims that the Will of Julia A. Lount, deceased, vested in said trustees

> "a life estate only" (See brief of Skrehot and Young, page 4).

What petitioner does contend is that the legal title is vested JOINTLY in the trustees in fee subject to the trust but the BENEFICIAL estates are not joint estates but are owned in severalty by the heirs of Julia A. Lount, as successors to the beneficial interest of William B. Lount, now deceased, and Hattie L. Mosher. That these beneficial estates are IPSO FACTO "life estates" and for this very reason can not merge with the JOINT ESTATE held by the trustees in fee, because the beneficial life interests differ from the legal fee both in quantity and quality.

**Argument.**

It is true that the question of whether the life estates created were merged into fee simple estates, is not, in express language, discussed in the cases of *In Re Sears Estate*, 54 Ariz. 52, 91 Pac. (2d) 874, and *Smith* v. *Teel*, 35 Ariz. 274, 276 Pac. 850, but the inescapable EFFECT of the decisions is that in Arizona, the broadest possible powers of management and sale, coupled with a life estate do not convert the life estate into a fee simple.

We quote from *In Re Sears Estate* (*supra*), page 875, Col. 2, as follows:

> "I give unto my said wife the full power and authority to use and consume all or any portion of my estate and to that intent and purpose I give her full power and authority to lease, mortgage, sell or otherwise manage and dispose of any and all of the same to the same extent and in the same manner that she would use and enjoy the same were it her sole and separate property, without making any accounting therefor to any one or to any court whatever.
>
> Item Three: Upon the death of my said wife, whatsoever of my estate then remains, I give, devise and bequeath in the following manner, to-wit: * * *".

The analogy to the case at bar is striking, the only essential difference being that the residual beneficiaries in the instant case take by operation of law, whereas in the "*Sears*" case they are named.

In the "*Sears*" case the remainder is spoken of as

> "At most residual and contingent" (91 Pac. (2d) 875, Col. 2).

Nevertheless it is apparent that the will of W. P. Sears, deceased, is upheld and the life estate is not regarded as having merged in the fee because the case of *Smith* v. *Teel*, 35 Arizona 274, 280, 276 Pac. 850, 852, in which a similar life

estate is specifically upheld, is quoted with approval, and for the further reason that the Supreme Court said 91 Pac. (2d) 874, at 876, Col. 1,

> "The court correctly rejected the exceptions to the annual report and account of the executrix".

If the remainder of the estate had been merged in the life tenant and she had become the outright owner of the personalty and the fee simple tenant of the realty, then there would have been no reason for any accounting whatsoever.

In the case of *Smith* v. *Teel*, 35 Ariz. 274, 276 Pac. 850, the court specifically says that the interest of the widow and life tenant having very broad and almost unlimited power of sale, is a LIFE interest. We quote from 276 Pac. at page 852, Col. 1, as follows:

> "Under these facts it is clear that Mrs. Smith was the owner in fee of one half of the 70 acres, it being community property, and under the terms of Mr. Smith's will that she was also after his death the owner of a life interest in the other half."

It is clear therefore that our State Supreme Court necessarily decided in each of the foregoing Arizona cases that the mere addition of very broad powers of sale to a life estate does not create a fee simple estate.

The life tenants in the two Arizona cases cited, not only had the power of sale, but were invested with the unrestricted use of the rents, issues and profits of the estate, in like manner as William B. Lount and Hattie L. Mosher, in the Will of Julia A. Lount, deceased.

It is next argued by respondents Skrehot and Young that Section 4232, Revised Statutes of Arizona, 1901, has never been interpreted with reference to the questions here involved.

We think it is not necessary that Section 4232, Revised Statutes of Arizona, 1901, should have been interpreted by

our Supreme Court. The fact that such a statute existed in Arizona in 1901, renders it PROBABLE that the decision of the Circuit Court of Appeals is in conflict with local decisions, thought not yet rendered.

> "While absence of a decision in a state court on a statute prevents proof of an exact conflict thereon, the petitioner nevertheless may satisfy the reason by demonstrating that 'probably' the decision is in conflict with applicable decisions of the state courts."
>
> *Hughes Federal Practice*, Vol. 8, Chapter 102, Section 6302, at page 549, last 5 lines of Paragraph (2).

Petitioners respectfully state to this Court that this is the first time any petition requesting a writ of certiorari to the Circuit Court of Appeals, has ever been filed, concerning the Will of Julia A. Lount, deceased.

It is true that a matter concerning the estate of Julia A. Lount, deceased, was taken to the Circuit Court of Appeals where an adverse ruling was rendered. The opinion in this case may be found in 91 F. (2) at page 582.

This court will observe that the case in 91 F. (2) 582 is captioned "*Collins* v. *Mosher*".

Hattie L. Mosher is sued as an individual.

It is quite apparent from the very outset that the learned counsel for appellant (Collins) in that case never regarded the Will of Julia A. Lount, standing alone, in and of itself, as creating a valid trust.

It is said in the foregoing case at page 584, Column 1, line 24:

> "He argues that a trust was created by the will in favor of UNNAMED beneficiaries and that the identity of these beneficiaries is disclosed in the oral and written communications said to have been made by the testatrix to her son and daughter."

No rule of law is more firmly imbedded than the rule that extrinsic evidence may be used to identify named beneficiaries or to clarify ambiguities, but never to supply something altogether omitted from the will.

Moreover counsel in the cause of *Collins* v. *Mosher,* 91 F. (2) 582, clearly did not believe the will standing alone created an express trust.

It is said in the foregoing cause

> "Some years later the two agreed upon a division of the property between themselves and exchanged quit claim deeds to effect the division. In the exchange the lots in question were conveyed to the respondent."

Thus it appears that in the foregoing case the respondent, Hattie L. Mosher, was treated as being the owner of the lots in fee simple.

Under such conditions if there was any trust at all in favor of Collins it could only have been in the nature of a constructive trust. The will would be only incidental to the establishment of such a trust as tending to corroborate the intent of the testatrix as evidenced by the letter.

In the instant case Hattie L. Mosher is sued as trustee. It is petitioners' contention that this will was drawn by the subscribing witnesses, W. H. Stilwell and J. M. Jamison, both of Phoenix, and both experienced practitioners licensed to practice in the Supreme Court of the United States. The will was written as intended and is valid as it stands.

It effectually carries out the intention of the testatrix as expressed in her letter as set forth in 91 F. (2) at page 584, Col. (2).

It permits her son and daughter to handle the property free of restraint from their respective spouses, a characteristic of all valid trusts, and not an unusual wish on the part of the testatrix.

It also insures by inevitable operation of law, as a resulting trust that any "even the smallest piece of land left"

after the death of the trustees and beneficiaries would then, and not until then, revert back to the estate of the deceased and therefore vest in the grandchildren, the "blood heirs" of the deceased.

The letter should be treated as an explanation of, not as an addition to the will of Julia A. Lount, deceased.

If the deceased spoke of her grandchildren as the trust beneficiaries of her will, it serves but to show her tender regard for them as her "blood heirs". There is no doubt the deceased hoped and expected that much of her considerable holdings would descend to her grandchildren.

Whether the will is silent as to ultimate beneficiaries by design of the learned counsel by whom the same was drawn, as we contend, or by mere inadvertence, is immaterial, for the result is the same.

The specific naming in the will of two beneficiaries, William B. Lount and Hattie L. Mosher with full discretionary powers to manage and dispose of the estate for their own best interest is quite sufficient by the great weight of the authorities to sustain the trust as a spendthrift trust, or at least a discretionary trust, which is in the nature of a spendthrift trust and partakes of its characteristics.

Even unaided by extrinsic evidence to show that the testatrix desired her "blood heirs" to take the reversion, if any, they would do so by operation of law as resulting *cestuis ques trustent.*

In the instant case your petitioners are looking WITHIN the will itself for the "beneficiaries". The will itself is held valid as creating an "express trust". In the case of *Collins* v. *Mosher* counsel for appellant was looking "outside" the will for the beneficiaries, attempting to show a "constructive trust".

In the *Collins* v. *Mosher* case the quit claim deeds between the parties were recognized clearly because no valid trust was claimed to be created by the will itself, standing alone.

In the instant case, both because of the statute Section 4232 Revised Statutes of Arizona, 1901 (Appendix to Petition, page 15), and by the common law the mere act of the beneficiaries of the trust unsanctioned by any court in attempting to divide the trust is repudiated by your petitioners as wholly void.

The trustees could not delegate the trust. They had no power to partition the property, and thus partition the responsibility, between themselves.

*Caldwell* v. *Graham,* 115 Md. 122, 80 A. 839.

The following is copied verbatim from the Reply Brief in *Collins* v. *Mosher, et al.,* No. 9505, C. C. of Appeals, pages 16 and 17, filed as an Exhibit in the instant case, in this court.

> "It is elementary that the discretionary duties of a trustee can not be delegated and no authorities need be cited upon this *upon this* point.
>
> The trustees had no power to partition the property, and thus partition the responsibility, between themselves.
>
> *Caldwell* v. *Graham,* 80 A. 839, 115 Md. 122, 38 L. R. A. (N. S.) 1029.
>
> Since the purpose of the trust as gathered from the will itself would not be terminated until the death of both trustees, or the exhaustion of the property, it follows, by all of the authorities, that even a Court of Equity, at the request of all of the beneficiaries, they being of lawful age, will not dissolve the trust.
>
> We quote from Bogert on Trusts as follows:
>
> 'In states recognizing Spendthrift Trusts also, it is apparent that the court will not end the trust on application of the *cestuis,* although all are of full age and sound mind.'
>
> Bogert Trusts, Vol. 4, page 2932, Section 1002.
>
> Citing cases from Connecticut, Illinois, Michigan, Kentucky, and Pennsylvania.

Even if the trust was not a Spendthrift Trust the court would not terminate it at the request of the *cestuis.*

We quote:

'But the majority of American Courts which have considered this problem have come to the opposite conclusion, and have declined to decree the termination of an active trust, with purpose to be achieved, even though it was not of spendthrift character and even though all cestuis were in existence, ascertained, competent, and before the court praying for its extinction.'

Bogert Trusts, Vol. 4, page 2934, Section 1002.

Citing cases from:
Circuit Court of Appeals,
U. S. Supreme Court,
California, Connecticut, Florida,

and fourteen other states.

Certainly the trust could not be terminated at the mere whim of the beneficiaries without court action."

Certainly then the instant case cannot be said to turn upon the same theory as the previous case.

In so far as the old case is concerned there is language which would indicate that subparagraph Arabic 5, under Roman II of the Trust Will (R. C. 11) (R. L. 13) is not included in the trust provisions. This is clearly not the case, however, because by the very first and all inclusive paragraph of Roman II, ALL of the residue is left in trust to be managed, controlled, leased, sold and distributed, in manner following: Then follow five, not four, subparagraphs and it is only in paragraph 5 that any power is given to "distribute" any of the proceeds of the real property, and it follows, considering the provisions for succession of trustees and the obvious magnitude of the estate as compared to

the paltry provisions of the first four Arabic paragraphs that the whole property was left in trust.

Indeed the Circuit Court of Appeals in the old case, page 584, col. 2, par. 2, admit as much, but say that the trust created is a

"* * * sort of fictitious trust".

The purpose of the trust nowhere appears in the will itself, and your petitioners respectfully urge upon this Court that they should not be bound by the extrinsic evidence erroneously admitted in the old case to vary the terms of the express trust.

The two cases were tried upon entirely conflicting theories, and the old case was not, and could not be, pleaded in bar of the second case.

If extrinsic evidence is to be admitted at all there may have been many reasons which the deceased never expressed to her children for wishing to protect them by placing the property in their joint control and subject to their joint discretion instead of allowing it to be squandered by the individual whim of either.

Whatever may be said of the old case as a bar to the rights of J. D. Collins it certainly cannot affect the rights of your petitioner S. D. Lount. Indeed the fact that this matter was first presented to the Circuit Court of Appeals by your petitioner J. D. Collins upon what now seems to have been a wholly erroneous theory, but accentuates the hurt suffered by your petitioner S. D. Lount, a true blood heir, for the decision in his appeal to the Circuit Court of Appeals upon the true theory was unquestionably prejudiced by the old case presented by petitioner Collins.

Indeed if the old case had been submitted upon the present theory it is possible that an entirely different result might have been reached.

It is next contended by respondents Skrehot and Young that your petitioners feared to try their case in the State Supreme Court.

J. D. Collins is a resident of Oregon and S. D. Lount is a resident of California (R. C. 2) (R. L. 2). They have an inalienable right to try their cases in Arizona in the Federal courts when the requisite amount is involved.

Counsel for petitioners was strongly persuaded that the will of Julia A. Lount, by the very great weight of both reason and authority, created a valid express trust without extrinsic aid.

Since the Circuit Court of Appeals had already been called upon to consider this will, albeit from a different point of view, it seemed best and most expedient to again present the matter to the Circuit Court of Appeals under what now seems to your petitioners as the only true theory of the will.

If the Circuit Court of Appeals should choose to abide by the first decision, though differently presented, then your petitioners would have the right to petition this court for certiorari.

Only in this way could a conflict between the Federal and State decisions be avoided. Either petitioner must ask the Circuit Court of Appeals to distinguish its own case or they must ask the State court to go counter to the Circuit Court of Appeals because of their own previous decisions.

The former course seemed the wiser and the better, since it is a special prerogative as set forth in rule 38 of the rules of this court to issue a writ of certiorari where such a conflict exists.

What the State court might, or might not, have done, confronted by the previous ruling of the Circuit Court of Appeals, is a matter of pure speculation. The important consideration is that the rulings of the Circuit Court of Appeals, which came originally from an erroneous theory of

this will, are contrary to the announced principles of the Supreme Court of Arizona upon an important point of local law as announced in two cases, and unless a certiorari is granted herein, this conflict can never be rectified and your petitioners S. D. Lount as well as J. D. Collins will be deprived of their rights which are clearly theirs under the will of Julia A. Lount, deceased.

It is also clear that the law as announced in the instant case is in conflict with the law as announced in

*Vellacott* v. *Murphy,* 16 F. (2d) 700,

upon a point of general law, applicable in Arizona, as elsewhere, to the effect that a trust is valid where there is a plurality of trustees, or beneficiaries.

It is not disputed that the matters involved are of local concern, nor that they are important matters.

**Merits.**

It is upon the merits that petitioners' contention is the strongest.

So clear does it seem that error has crept into the interpretation of this will, and how it has crept in by an original erroneous presentation of the whole matter, that this alone should incline this court to a favorable consideration of our petition, particularly of the petition of S. D. Lount, a blood heir, who is the victim of the acts of others and is about to lose his interest thereby.

The chief difficulty it seems in the whole matter has grown out of the failure on the part of the Circuit Court of Appeals and counsel for respondents, as well, to distinguish between the legal estate, which is devised in fee, subject to the trust, and the beneficial estates which are life estates.

True a remainder after a LIFE ESTATE would vest immediately in the children of deceased, but a POSSIBILITY OF RE-

VERTER arising as a resulting trust after the device of a fee, in trust, when the whole of the *res* was not consumed by the trustees would spring up at the termination of the trust.

To avoid any objection to the case as a moot question petitioners have alleged that a part of the estate has already reverted since the death of Willima B. Lount in 1924. The value of the part which has already reverted is alleged to be in excess of three thousand dollars ($3,000.00) (R. C. 4) (R. L. 3).

Petitioner S. D. Lount is likewise asking for an accounting and that an additional trustee be appointed. The trustee is joined as a party defendant and a declaratory judgment is asked (R. L. 9).

Under the circumstances it cannot be said that there are no present rights to be determined. There are many rights to be determined, and if they are not determined now the adverse claims of others may forever bar all claims of your petitioners in the property described and the whole thereof.

For all of the above reasons our petition for certiorari should be granted.

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E. S. SELDEN,
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